No. 77-206

In the Supreme Court of the United States

OCTOBER TERM, 1977

ELIAS KENAAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-15a) is reported at 557 F. 2d 912. The opinion of the district court (Pet. App. 1a-5a) is reported at 422 F. Supp. 226.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on July 7, 1977. The petition for a writ of certiorari was filed on August 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal

criminal charges, constitutes a "detainer" making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

STATEMENT

1. In an indictment filed in the United States District Court for the District of Massachusetts on April 13, 1976, petitioner was charged with three counts of income tax evasion, in violation of 26 U.S.C. 7201, and three counts of knowingly filing false income tax returns, in violation of 26 U.S.C. 7206(1) (App. 3-6).[1] At the time that the indictment was returned, petitioner was incarcerated at a Massachusetts correctional facility serving a sentence on a state criminal charge (Pet. App. 7a). On April 30, 1976, petitioner was transferred from the state facility and produced, pursuant to a writ of *habeas corpus ad prosequendum*, before the district court for arraignment on the indictment. After entering a plea of not guilty, petitioner was returned that same day to the state institution (App. 1, 39-40).

On June 28, 1976, petitioner was again removed from state custody and brought before the district court pursuant to a writ of *habeas corpus ad prosequendum*, this time for the purpose of offering a guilty plea to the indictment. The district court, however, declined to accept the plea. Later that day petitioner was returned to state prison (App. 1-2, 8-10, 11-23, 40).

Petitioner subsequently moved to dismiss the indictment on the ground that he had been produced in federal court and thereafter returned to state prison without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on

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[1]"App." refers to the appendix in the court of appeals.

Detainers Act ("Agreement").[2] Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (subject to continuances granted "for good cause shown in open court") and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Articles IV(c), IV(e), and V(c).[3]

2. In granting petitioner's motion to dismiss, the district court held that the Interstate Agreement on Detainers is the exclusive method of securing prisoners from

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[2]The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478. At all times relevant hereto, Massachusetts was also a party to the Agreement. Mass. Gen. Laws ch. 276, App., Sections 1-1 to 1-8 (1966).

[3]Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d), and V(c).

member states for trial on federal charges,[4] and that petitioner's transfer from state prison to federal court and his return to state prison without being brought to trial on the indictment required dismissal of the indictment with prejudice, pursuant to Article IV(e) of the Agreement (Pet. App. 1a-5a).

On the government's appeal, the court of appeals reversed the district court's order of dismissal (Pet. App. 6a-15a). In so doing, the court expressly declined to follow *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y.) and the other precedents relied upon by the district court (*id.* at 10a-11a). After noting the fundamental differences—in purpose, legal basis, and historical development—between the writ of *habeas corpus ad prosequendum* and a "detainer" (as the latter term is defined in the Senate Judiciary Committee Report accompanying the Act),[5] the court held that the writ and detainer each constitutes "a separate, distinct avenue for obtaining custody of prisoners for federal prosecution" (*ibid.*). On this basis, the court

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[4]In support the district court cited *United States* v. *Sorrell*, 413 F. Supp. 138 (E.D. Pa.), affirmed, C.A. 3 (*en banc*), No. 76-1647, August 22, 1977; and *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y.), affirmed, 544 F. 2d 588 (C.A. 2), certiorari granted, October 3, 1977 (No. 76-1596). It also relied on *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (C.A. 3) (Pet. App. 4a), but, as the court of appeals recognized (Pet. App. 10a n. 7), that case does not involve a transfer from state to federal jurisdiction, but rather the transfer, pursuant to a state writ of *habeas corpus ad prosequendum*, of a federal prisoner for trial on state charges.

[5]The writ derives from ancient common law usage and more particularly from Section 14 of the First Judiciary Act, 1 Stat. 81. See *Carbo* v. *United States*, 364 U.S. 611, 614.

The detainer is of much more recent vintage and is nothing more than a notification, from one State to another, that a particular inmate is wanted to face charges in the notifying State.

concluded that the transfers of petitioner to federal court pursuant to the writ of *habeas corpus ad prosequendum* did not activate the provisions of the Agreement.[6]

DISCUSSION

The petition here raises the same question that is presented in *United States* v. *Mauro*, No. 76-1596:[7] Whether a federal writ of *habeas corpus ad prosequendum* issued to secure the presence of a state prisoner for trial on federal charges constitutes a "detainer" rendering applicable the terms and conditions of the Interstate Agreement on Detainers Act.[8] As this Court has recently granted our petition in *Mauro*, we suggest that this Court defer decision on the present petition pending ~~its disposition of our~~ final disposition of that case.

We note, however, that the Second Circuit, which decided *Mauro*, has declined to apply the Agreement to transfers by a writ of *habeas corpus ad prosequendum* where the

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[6]Although it noted that petitioner would have been confined in the same facility if he had been held in federal "custody" during his trial, the court stated that this coincidence had not influenced its decision (Pet. App. 13a n. 10). But see *United States* v. *Sorrell* and *United States* v. *Thompson*, C.A. 3, Nos. 76-1647 and 76-1976, decided August 22, 1977 (*en banc*) (separate dissenting opinions of Weis, J. and Garth, J.).

[7]We are providing petitioner with a copy of our petition in *Mauro*.

[8]The question presented here is also related to the questions raised in *United States* v. *Ford*, No. 77-52, certiorari granted, October 3, 1977, and *United States* v. *Ferro*, No. 77-326, in which the United States has sought review of decisions of the Second Circuit holding that Article IV of the Agreement governs the transfer of a state prisoner by a federal writ of *habeas corpus ad prosequendum* after a "detainer" had been filed against him with state prison authorities. In the *Ford* and *Ferro* petitions we have also presented the additional question whether the defendant waived his claim under the Agreement by failing to raise it in the district court.

transferred defendant remained in federal custody but a few hours. *United States* v. *Chico*, 558 F. 2d 1047. In that case the court held that Article IV(e) of the Agreement "does not apply to a case where a prisoner is removed from the prison of a state for a few hours to be arraigned, plead and be sentenced in the federal court without ever being held at any place of imprisonment other than that of the sending state and without interruption of his rehabilitation there" (*id.* at 1049). The facts in this case are, perhaps, even more compelling than in *Chico*, since petitioner would have remained in the same correctional institution even if "custody" of petitioner had formally passed from state to federal authorities (Pet. App. 13a, n. 10). We recognize that the Third Circuit has taken a different view on this issue, however, *United States* v. *Thompson, supra,* and thus believe that our recommendation to defer consideration of this petition pending disposition of *Mauro* remains appropriate.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Mauro, supra.*

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.